A

U-MENG HOLDINGS SDN BHD & ANOR

v.

TAN SRI DATUK IBRAHIM MOHAMED; AMBANK (M) BHD (THIRD PARTY)

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
HISHAMUDDIN MOHD YUNUS JCA
KANG HWEE GEE JCA

C

[CIVIL APPEAL NO: A-03(IM)-215-2009]
18 SEPTEMBER 2010

CIVIL PROCEDURE: *Pleadings - Amendment - Amendment of defence - Proposed amendments offending rules of pleadings - Amendments not*

D

formulating any cause of action - Amendments containing particulars of evidence - Amendments involving third parties - Amendments referring to affidavit filed in unrelated suit - Criteria for allowing amendments - Whether proposed amendments contravened O. 20 r. 5 Rules of the High Court 1980 - Whether unreasonable delay in applying to amend defence -

E

Whether amendments allowed

By way of a written contract, the respondent agreed to transfer to the first appellant certain shares in consideration of the first appellant assigning to the respondent the rights and benefits of two separate judgment debts secured by Yew Securities Sdn Bhd ("Yew

F

Securities"). Pursuant to the contract, the respondent delivered to the appellants the memorandum of transfer and the share certificates for the shares. As consideration for this transfer, the second appellant executed on behalf of the first appellant a deed of

G

assignment assigning the judgment debts to the respondent. However, later it was found that the assignment was not effective and the respondent sought to recover the value of the transferred shares. The appellants filed an application to amend their statement of defence. The proposed amendments intended to explain further

H

the purpose and motive of the appellants and Yew Securities entering into the deed of assignment. The respondent objected to the amendments arguing that he was not a party to the deed of assignment and that the particulars in the proposed amendment concerned third parties. The registrar dismissed the application and

I

the appellants' appeal to the judge in chambers was dismissed. Hence, this appeal.

Held (dismissing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The proposed amendments offended the rules of pleadings for the following reasons: (a) they fell short of formulating any cause of action; (b) they contained particulars of evidence of motive and intent rather than concise statement of fact; (c) they brought into the picture the deed of assignment involving third parties where the respondent was not involved as a party; and (d) they contained admissions that were made on behalf of third parties – judgment debtors, and the respondent was in no position to verify the veracity of those admissions and they should therefore be reserved for trial where witnesses would be called to determine its relevancy and admissibility. (para 26)

(2) The proposed amendment made reference to a sworn affidavit filed in a winding-up proceeding where the respondent was not a party and had no knowledge of the contents of the affidavit. The sworn affidavit and its contents were evidential material which should be introduced through witnesses where its veracity can be tested. (para 34)

(3) Where the proposed amendments do not change the character of the dispute and are made *bona fide* and cause no prejudice to the opposite party which could not be compensated with costs, the court would allow such amendments. (paras 60 & 62)

(4) The proposed amendments contained detailed particulars of evidence which would compromise the neutrality of the trial judge whether consciously or sub-consciously before he proceeded to hear the evidence and this would in turn expose the respondent to pre-judgment, prejudice and probable untruth. To allow the proposed amendments would prejudice the fair trial of the respondent's action. The proposed amendments were therefore vexatious and an abuse of the process of the court. The proposed amendments contravened O. 20 r. 5 of the Rules of the High Court 1980 in that they were not concise statements of material facts but rather detailed evidence and the prejudice to the respondent could not be compensated by costs. (paras 71-73)

(5) The third party proceedings commenced by the appellants were separate proceedings and they bore no relevance to the respondent. The issues between the appellants and the third party could not be enhanced by amendments to the statement

of defence. (para 75)

(6) Calculated from the date the appellants filed their original statement of defence to the date when the appellants filed the application to amend their statement of defence, the delay was 4 years 10 months 27 days. The delay was construed in favour of the respondent. (paras 78-80 & 83)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian bertulis, responden dalam kes ini bersetuju untuk memindahkan saham-saham tertentu kepada perayu pertama atas balasan perayu pertama menyerahhak kepada responden hak-hak dan manfaat yang berbangkit dari satu hutang penghakiman yang diperolehi oleh Yew Securities Sdn Bhd ("Yew Securities"). Berikutnya, responden menyerahkan memorandum pindahmilik dan sijil-sijil saham bagi saham-saham tersebut kepada perayu-perayu. Sebagai balasan bagi pindahmilik tersebut, perayu kedua telah memeterai, bagi pihak perayu pertama, satu suratikatan serahhak menyerahhak hutang penghakiman kepada responden. Penyerahanhak tersebut, bagaimanapun, kemudiannya didapati tidak efektif dan responden menuntut kembali nilai saham-saham yang telah dipindahmilik. Perayu-perayu kemudian memfail permohonan untuk meminda pernyataan pembelaan mereka. Pindaan yang dicadangkan itu bertujuan untuk menjelaskan lagi maksud dan motif perayu-perayu dan Yew Securities dalam memeterai suratikatan serahhak. Responden membantah pindaan dan berhujah bahawa ia bukan pihak kepada suratikatan serahhak dan bahawa butir-butir di dalam pindaan yang dicadangkan adalah berkait dengan pihak ketiga. Pendaftar telah menolak permohonan dan rayuan perayu-perayu kepada hakim dalam kamar juga telah ditolak. Perayu-perayu dengan itu merayu.

Diputuskan (menolak rayuan):
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Pindaan yang dicadangkan telah melanggar kaedah pliding atas sebab-sebab berikut: (a) ia jauh dari merumuskan apa-apa kausa tindakan; (b) ia mengandungi butir-butir keterangan mengenai motif dan niat dan bukannya pernyataan-pernyataan fakta; (c) ia membangkitkan perkara suratikatan serahhak yang melibatkan pihak ketiga di mana responden sebagai suatu pihak langsung tidak terlibat; dan (d) ia mengandungi pengakuan yang dibuat

bagi pihak-pihak ketiga – iaitu penghutang penghakiman, di mana responden tidak berada dalam keadaan yang membolehkannya mengesahkan pengakuan-pengakuan tersebut, yang bermakna perkara itu harus dirizabkan untuk perbicaraan di mana saksi-saksi boleh dipanggil bagi menentukan kerelevanan dan kebolehterimaannya.

(2) Pindaan yang dicadangkan telah membuat rujukan kepada satu pengikraran afidavit yang difailkan dalam suatu prosiding penggulungan di mana responden bukan pihak kepadanya dan tidak mempunyai pengetahuan akan kandungan afidavit tersebut. Afidavit yang diikrarkan dan kandungannya adalah bahan pembuktian yang sepatutnya dikemukakan melalui saksi-saksi di mana kesahihannya boleh diuji.

(3) Di mana pindaan dicadangkan tidak menukar sifat pertikaian dan dibuat secara *bona fide* dan tidak menyebabkan prejudis kepada pihak lawan yang tidak boleh dipampasi dengan kos, maka mahkamah akan membenarkan pindaan sedemikian.

(4) Pindaan yang dicadangkan mengandungi butir-butir keterangan secara terperinci yang akan mengkompromi keberkecualian hakim bicara sama ada secara sedar ataupun tidak sedar sebelum beliau meneruskan dengan pendengaran keterangan dan ini akan mendedahkan responden kepada pra-penghakiman, prejudis dan mungkin juga ketidakbenaran. Maka membenarkan pindaan yang dicadangkan akan memprejudiskan perbicaraan adil tindakan responden. Pindaan yang dicadangkan dengan itu menyusahkan dan suatu salahguna proses mahkamah. Pindaan yang dicadangkan adalah juga bertentangan dengan A. 20 k. 5, Kaedah-kaedah Mahkamah Tinggi 1980 dalam ertikata ia tidak mengandungi kenyataan-kenyataan tepat fakta material tetapi sebaliknya mengandungi keterangan secara terperinci, sementara prejudis kepada responden tidak dapat dipampasi dengan kos.

(5) Prosiding pihak ketiga yang dimulakan oleh perayu-perayu adalah prosiding yang berasingan dan ianya tidak kena mengena dengan responden. Isu-isu di antara perayu-perayu dan pihak ketiga tidak dapat ditambah nilai melalui pindaan kepada pernyataan pembelaan.

(6) Dikira dari tarikh perayu-perayu memfailkan pernyataan pembelaan asal mereka hingga ke tarikh mereka memfailkan permohonan mereka untuk meminda pernyataan pembelaan, kelengahannya adalah 4 tahun, 10 bulan dan 27 hari. Kelengahan tersebut harus ditafsir secara yang memanfaatkan responden.

Case(s) referred to:

Bruce v. Odhams Press, Limited [1936] 1 KB 697 ***(refd)***

Chin Kok Kwong Construction Sdn Bhd v. Sunrise Towers Sdn Bhd [1984] 2 CLJ 232; [1984] 1 CLJ (Rep) 522 HC ***(refd)***

Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors [2006] 6 MLJ 328 ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

HSBC Bank Malaysia Bhd v. Macquarie Technologies (M) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***

Kaplands Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2000] 4 CLJ 281 ***(refd)***

Ketteman and Others v. Hansel Properties Ltd And Others [1987] 1 AC 189 ***(refd)***

Khoo Tau Guan v. Weng Lai Ping & Ors [2004] 5 CLJ 249 HC ***(refd)***

Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor And Other Appeals [2000] 3 CLJ 797 CA ***(refd)***

Re Estate of Lee Siew Kow, Deceased; Gan Eng Neo (W) & Two Ors v. Yeo Siew Neo (W) [1951] 1 LNS 71 HC ***(refd)***

Kings Quality Homes Ltd v. AJ Paints Ltd [1997] 3 All ER 267 ***(refd)***

Knowles v. Roberts [1888] 38 Ch D 263 ***(refd)***

Lim Yong Swan v. Lim Jee Tee & Anor [1993] 1 SLR 500 ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1977] 1 LNS 75 HC ***(refd)***

North-Western Salt Company, Limited v. Electrolytic Alkali Company, Limited [1913] 3 KB 422 ***(refd)***

Public Bank Bhd v. Pan Pacific Asia Bhd [2005] 1 LNS 385 HC ***(refd)***

Rassam v. Budge [1893] 1 QB 571 ***(refd)***

RHB Bank Bhd v. Dong Haeng Industries Sdn Bhd [2001] 1 CLJ 417 HC ***(refd)***

Sio Koon Lin & Anor v. SB Mehra [1980] 1 LNS 135 FC ***(refd)***

Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 CA ***(refd)***

Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2004] 7 MLJ 224 ***(refd)***

Tan Sri Dato Paduka (Dr) Ting Pek Khing v. Hii Chang Pee (No 2) [2003] 5 CLJ 554 HC ***(refd)***

The 'Virginia Rhea'; China Steel Corp & Anor v. MV 'Virginia Rhea', Owners of [1982] 1 LNS 66 ***(refd)***
Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party) [2000] 6 CLJ 548 HC ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 7(1), 8(1)(a), (c), 19(1), O. 20 r. 5(3), O. 41

For the appellants - MP Meyappan; M/s KL Choy & Co
For the respondent - Youggesswari Singam; M/s Zainal Abidin & Co

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] On 12 October 2001, the respondent filed his writ of summons and his statement of claim.

[2] On 6 December 2001, the appellants filed their statement of defence.

[3] On 20 March 2002, the registrar struck out the respondent's writ of summons and the statement of claim.

[4] On 17 March 2003, the respondent's appeal to the judge in chambers against the decision of the registrar was dismissed.

[5] Aggrieved, the respondent filed an appeal to this court and his appeal was allowed on 14 June 2005. This meant that the respondent's writ of summons and the statement of claim were re-instated.

[6] On 3 November 2006, by way of summons in chambers in encl. 43, the appellants filed an application to amend their statement of defence.

[7] On 27 July 2007, the registrar dismissed encl. 43.

[8] On 3 August 2007, the appellants filed an appeal to the judge in chambers in encl. 72 against the decision of the registrar in dismissing encl. 43.

[9] On 23 June 2009, the learned Judicial Commissioner ("JC") dismissed the appellants' appeal in encl. 72.

[10] On 1 July 2009, the appellants filed an appeal to this court.

The Appellants' Statement Of Defence Filed On 6 December 2001

[11] There were 33 paragraphs in the statement of defence filed on 6 December 2001. And altogether there were 11 sub-paragraphs to that statement of defence.

The Third Party – Ambank (M) Berhad

[12] The statement of claim by the appellants against the third party was dated 18 September 2006.

[13] And the statement of defence of the third party against the claim by the appellants was dated 2 October 2006.

The Salient Facts

[14] Within a short compass, the salient of facts may be stated as follows. By way of a written contract dated 5 August 1993, the respondent agreed to transfer to the first appellant (U-Meng Holdings Sdn Bhd) 5.1 million shares in Damansara Realty Berhad (hereinafter referred to as the "DRB shares") in consideration of the first appellant assigning to the respondent the rights and benefits of two separate judgment debts secured by Yew Securities Sdn Bhd (hereinafter referred to as the "Yew Securities"). Both these two separate judgment debts were from the Ipoh High Court, namely:

(i) a judgment obtained by Yew Securities on 30 August 1986 against Safuan Holdings Sdn Bhd in the Ipoh High Court *vide* civil suit number 23-316-86 for a sum of RM2,188,635.54 together with interest thereon at 16 per centum per annum; and

(ii) a judgment obtained by Yew Securities on 18 March 1987 against Myriacorp Sdn Bhd in the Ipoh High Court *vide* civil suit number 23-357-86 for a sum of RM5,487,868.45 together with interest thereon at 16 per centum per annum.

[15] These two separate judgment debts shall hereinafter be collectively referred to as the "judgment debts" based on the terms and conditions as set out in the said written contract.

[16] By virtue of the said written contract, the respondent delivered to the appellants the duly registrable memorandum of transfer together with the share certificates in marketable lots of 1,000 shares each in respect of the DRB shares. This was done sometime after October 1994 which were accepted by the first appellant.

[17] As consideration of the transfer of the DRB shares by the respondent to the first appellant and pursuant to the said written contract, the second appellant (Foong Weng Yew) executed for and on behalf of the first appellant a deed of assignment dated 17 January 1995 (hereinafter referred to as the "deed of assignment") assigning the judgment debts to the respondent.

[18] It was approximately in July 1997 and in February 1998 that the respondent acted on the deed of assignment and proceeded to enforce the judgment debts assigned to the respondent by the first appellant. However, the enforcement proceedings were challenged by Safuan Holdings Sdn Bhd – the judgment debtor. Safuan Holdings Sdn Bhd placed the burden on the respondent to prove the respondent's status as assignor of the judgment debts. Because of the absence of a written assignment of the judgment debts from Yew Securities to the appellants, the respondent could not enforce the enforcement proceedings and had to withdraw the same.

[19] The respondent then filed the present claim against both the appellants and sought for the following prayers:

(i) a declaration that the first and the second appellants are constructive trustees for the respondent in respect of the 5.1 million DRB shares;

(ii) restitution by way of payment of RM12,750,000 being the amount in Ringgit Malaysia equivalent to the value of the 5.1 million DRB shares at the time of the transfer of the DRB shares to the first appellant and also based on the amount valued by the first appellant for the sale of the DRB shares at RM2.50 per share;

(iii) compensation *in lieu* of restitution;

(iv) interest at the rate of 8% on the value of the 5.1 million DRB shares at the time of transfer to the date of full realisation; and

(v) costs.

Analysis

[20] In this appeal, we are concerned with the refusal of the learned JC to allow the appellants to amend their statement of defence. By his refusal, the learned JC affirmed the decision of the registrar.

[21] The proposed amendments to the statement of defence contained 41 paragraphs. New paras. 32(a), 32(b), 32(c), 33(a), 33(b), 33(c), 33(d), 33(e), 34(a), 34(b), 34(c), 34(d), 34(e), 34(f), 34(g), 34(h), 35(a), 35(b), 35(c), 36 together with the particulars itemised as (a), (b), (c), (d), (e) and (f), 37, 38(a), 38(b), and 39 were added. While the former para. 32 was re-numbered as para. 40 and the former para. 33 was re-numbered as para. 41.

[22] The proposed amendments were unlike the case of *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577, FC where the proposed amendment there was to correct an erroneous civil appeal number in the pleadings. It was also unlike the case of *Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party)* [2000] 6 CLJ 548, where I held, while sitting on the High Court bench, that the proposed amendment in that case arose as a consequence of a typographical error in regard to the code number of the photograph.

[23] Amendments under O. 20 r. 5(3) of the Rules of the High Court 1980 ("RHC") may be allowed to correct a misnomer or where there has been a genuine mistake which was not misleading as to the identity of the party intended to sue. Here, the proposed amendments of the appellants to the statement of defence went far and wide. We will now demonstrate.

The Proposed Amendments At Paras. 32(a), 32(b), 32(c) And 33(a), 33(b), 33(c), 33(d) And 33(e)

[24] It is quite apparent that the proposed amendments at paras. 32(a), 32(b) and 32(c) intended to explain further the purpose and motive of the appellants and Yew Securities entering into the deed of assignment dated 9 February 1993. But the respondent argued

that he was not a party to the deed of assignment dated 9 February 1993 and that the particulars therein concerned third parties. We are of the view that the veracity of the contents of the proposed amendments at paras. 32(a), 32(b) and 32(c) would be best tested during the trial itself *via* witnesses. It is our judgment that to allow the proposed amendments as phrased and framed would subject the respondent to pre-judgment, prejudice and probable untruth in respect of the deed of assignment dated 9 February 1993 bearing in mind that the respondent was not a party to it. The proposed amendments can be termed as vexatious and an abuse of the process of the court. The proposed amendments too were designed to prejudice the fair trial of the respondent's action.

[25] We have read the proposed amendments at paras. 33(a), 33(b), 33(c), 33(d) and 33(e) and we found them to contain particulars of the evidence which could be led in open court through witnesses and they ought to be reserved for the trial judge to determine its relevancy and admissibility in the course of the trial.

[26] It is our judgment that the proposed amendments at paras. 32(a), 32(b), 32(c) and 33(a), 33(b), 33(c), 33(d) and 33(e) offended the rules of pleadings for the following reasons:

(a) the proposed amendments fall short of formulating any cause of action;

(b) the proposed amendments contained particulars of evidence of motive and intent rather than concise statement of fact;

(c) the proposed amendments brought into the picture the deed of assignment dated 9 February 1993 involving third parties where the respondent was not involved as a party; and

(d) the proposed amendments contained admissions that were made on behalf of third parties – judgment debtors, and the respondent was in no position to verify the veracity of those admissions and they should therefore reserved for trial where witnesses would be called to determine its relevancy and admissibility.

The Proposed Amendments At Paras. 34(a), 34(b), 34(c), 34(d), 34(e), 34(f), 34(g) And 34(h)

[27] These proposed amendments offended the rules of pleadings and they do not formulate any cause of action.

[28] Detailed evidence of the purpose and intent of the parties entering into the deed of assignment dated 9 February 1993 and the second deed of assignment dated 17 January 1995 were set out. The narration of the evidence concerned third parties and such evidence should be reserved for trial in order to determine its relevancy and admissibility.

The Proposed Amendments At Paras. 35(a), 35(b) And 35(c)

[29] Again, these proposed amendments offended the rules of pleadings and ought not to be allowed for the following reasons:

(a) the original statement of defence dated 6 December 2001 at paras 6.2, 7, 8, 9 and 10 made reference to the material facts in relation to the exclusion clauses in the deed of assignment and there was thus no necessity to repeat them, once again, in the proposed amendments; and

(b) the proposed amendments set out the evidence which should rightly be reserved at the trial proper.

The Proposed Amendments At Para. 36 Together With The Particulars Itemised As (a), (b), (c), (d), (e), and (f) And Para. 37

[30] These proposed amendments ought not to be allowed as they offended the fundamental rules of pleadings for the following reasons:

(a) it concerned disputed evidence and disputed documents;

(b) the two letters dated 15 February 1996 marked as exh. "TSI1" as seen at pp. 127 and 128 of the appeal record confirmed that enforcement proceedings commenced by the respondent was vigorously challenged by the solicitors Messrs David Lingam & Co for Safuan Holdings Sdn Bhd – the judgment debtor;

(c) another two letters also marked as exh. "TSI1" and dated 23 May 1996 and 29 May 1996 as seen at pp. 129 and 131 of the appeal record respectively confirmed in writing the objections

raised by the judgment debtor and the respondent's request to the appellants to assist to rebut the judgment debtor's objection and/or to a re-assignment to enable the appellants to enforce the judgment debts;

(d) these correspondences took place within the limitation period but the appellants failed to assist the respondent;

(e) the proposed amendments are not material facts but rather evidence which both sides will elicit during the trial proper by calling the makers of the disputed documents; and

(f) consequently, the proposed amendments offended the rules of pleadings.

The Proposed Amendments At Paras. 38(a) And 38(b)

[31] These proposed amendments incorporated material evidence of a third party – Safuan Holdings Sdn Bhd, which ought to be reserved for trial where witnesses would be called.

[32] The material contents of these proposed amendments together with the material contents of the letters in exhibit marked as "TSI1" as alluded to earlier ought to be reserved for trial where witnesses would be called.

The Proposed Amendment At Para. 39

[33] At para. 3 of the original statement of defence dated 6 December 2001, the appellants admitted that at all material times the second appellant was the managing director of the first appellant.

[34] The proposed amendment at para. 39 made reference to a sworn affidavit filed in a winding-up proceeding where the respondent was not a party and has no knowledge of the contents of the affidavit. Order 41 of the RHC states that an affidavit is a sworn statement by the deponent which contains statements of information and belief with sources stated therein. Thus, the sworn affidavit and its contents are evidential material which should be introduced through witnesses where its veracity can be tested.

The Arguments Advanced By The Appellants

[35] It would not be out of place to refer to the submissions of learned counsel for the appellants in regard to the proposed amendments to the statement of defence.

[36] In regard to the proposed amendments at para. 32, it was submitted that the appellants were merely pleading material facts to show that the plea on representations by falsity or recklessness or fraud against the appellants are in dispute and not true. It was also submitted that the appellants pleaded material facts to show that the first appellant obtained the assignment from Yew Securities for valuable consideration. Material facts too were pleaded, according to learned counsel, to show that there was valuable consideration in favour of MBF, to wit, the surrender of valuable debentures in consideration of assigning the Safuan debts to the first appellant.

[37] In regard to the proposed amendments at para. 33, learned counsel for the appellants submitted along the following lines. Relevant material facts were pleaded to show that the assignment to the respondent is valid in law and known to the respondent. That the precise words of the assignment are themselves material because they form the basis of an equitable assignment. Paragraphs 33(d) and 33(e) are relevant material facts to show that there was real and valuable benefit and consideration emanating from the appellants and for the benefit of the respondent. The averments were meant to negate the claim against the appellants of unjust enrichment and that the allegations of misrepresentation, false and fraudulent representations by the appellants were not true.

[38] Pertaining to the proposed amendments at para. 34, learned counsel for the appellants emphasised on the following salient points. That in compliance with O. 18 r. 8(1)(a) and (c) of the RHC, the appellants pleaded matters to show that what the respondent alleged in regard to the issue of unjust enrichment cannot be sustained. Given that unjust enrichment is an equitable remedy, all matters and material facts that are relevant to enable the court to exercise its discretion must be pleaded. And that the pleaded material facts arose out of the same transaction. The pleaded material facts had a bearing to such clauses like "as is where is basis", "no warranty of representation" and "own due diligence" that were inserted in the contract between the respondent and the first appellant. These facts were material to the defence to show that there was no failure of consideration and that there was indeed consideration emanating from the first appellant for the benefit of the respondent. And that the facts pleading indulgence and forbearance (both a genus of consideration) are relevant to show that consideration existed between the first appellant and the respondent in order to negate the plea of unjust enrichment.

[39] Learned counsel for the appellants submitted that the proposed amendments reflected at para. 35 were related to the insertion of clauses like "no warranty of representation" and the "as is where is" and also for the purpose of showing that the claims on the alleged false and fraudulent representations cannot be sustained.

[40] In regard to the proposed amendment at para. 36, the learned counsel for the appellants pointed out that it was in regard to the specific defence of change of position that the relevant material facts were pleaded.

[41] The reason to support the proposed amendment at para. 37 was not addressed by learned counsel for the appellants.

[42] Be that as it may, in regard to the proposed amendments at paras. 38 and 39, learned counsel submitted that only material facts relevant to challenge the claim of fraud against both the appellants as well as the claim of alter ego against the second appellant were pleaded. It was also submitted that the material facts are matters which the court should take judicial notice of.

The Law

[43] It is ideal to refer to O. 18 r. 7 of the RHC. It states as follows:

> 7 Facts, not evidence, to be pleaded (O. 18 r. 7)
>
> (1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
>
> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

A (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

B **[44]** In *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35, reference was made to the classic case of *Knowles v. Roberts* [1888] 38 Ch D 263, CA, where the basic guidelines as to pleadings were neatly set out:

C (a) Pleadings are concise statements of facts.

(b) And that only material facts and not law or evidence is to be pleaded.

D (c) In framing their cases, the parties must not offend the rules of pleadings laid down by the law.

[45] It is wise to restrict the contents of the pleading in a brief form, succinctly drafted and prepared in chronological order. Unnecessary matters that will clutter the pages should not be E pleaded.

[46] According to *Rassam v. Budge* [1893] 1 QB 571, no party should be allowed to plead any legal matter that is set out in his opponent's pleading or to any matter of fact which is not alleged F against him.

[47] Thus, only those material facts which are necessary for the purpose of formulating a complete cause of action would be incorporated in the pleading (*Bruce v. Odhams Press, Limited* [1936] 1 KB 697, CA; and *RHB Bank Bhd v. Dong Haeng Industries Sdn* G *Bhd* [2001] 1 CLJ 417 at 438).

[48] According to the case of *North-Western Salt Company, Limited v. Electrolytic Alkali Company, Limited* [1913] 3 KB 422, the parties must make sure that only the facts and not the law are to be H pleaded.

[49] And according to *Public Bank Bhd v. Pan Pacific Asia Bhd* [2005] 1 LNS 385, pleadings should be drafted in a summary form, alluding to the material facts and not the evidence by which they I are to be proved. The same principles of law are set out in *Re Estate of Lee Siew Kow, Deceased; Gan Eng Neo (W) & Two Ors. v.*

Yeo Siew Neo (W) [1951] 1 LNS 71; *Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor And Other Appeals* [2000] 3 CLJ 797, CA; and *RHB Bank Bhd v Dong Haeng Industries Sdn Bhd (supra)*.

[50] My learned brother Kang Hwee Gee JCA while sitting on the High Court bench had occasion to interpret O. 18 r. 7(1) of the RHC in the case of *Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors* [2006] 6 MLJ 328. There the question before his Lordship concerned the application of the fundamental rule of pleading as set out in O. 18 r. 7(1) of the RHC. The facts of that case may be stated as follows. The plaintiff, a former legal practitioner, sued the defendants for the return of a law library and for the discontinuance of the use of his name as the name of the defendant's law firm. The first defendant contended that the plaintiff was not entitled to claim the return of the library or seek the discontinuance of the firm's name. In his defence, the first defendant, *inter alia*, contended that the plaintiff had a specific motive for requesting the return of the law library and for wanting the defendants to cease using his name as the name of the firm. In para. 10 of his defence, the first defendant cited several particulars that ostensibly would establish such motive. The plaintiff applied to strike out para. 10 of the defence pursuant to O. 18 r. 19(1) of the RHC. The application was grounded essentially on the submission that the plaintiff's motive was irrelevant to the issues of ownership and conversion as pleaded by the plaintiff, and that para. 10 was scandalous, vexatious and calculated to embarrass or prejudice the fair trial of the plaintiff's action. The first defendant opposed the plaintiff's application on the basis that para. 10 was material to and directly connected to the facts in issue.

[51] At pp. 328 to 329 of the report, his Lordship held as follows (see the headnotes):

> (1) Order 18 r. 7(1) of the RHC requires a party to write his pleading in the form of a skeletal statement of fact sufficient to identify the matters complained of and to enable him to establish his case at the trial based on what he pleads. All matters of evidence to prove his case are to be reserved for the trial and must not be pleaded (see para 17).
>
> (2) To satisfy the rule on pleadings, the first defendant was only required to plead 'material facts' necessary for his defence – material facts being facts relevant to his defence. In the instant

A case, the High Court would accept that the first defendant had pleaded a material fact in paragraph 10 of his defence (see paras 22-23, 25).

(3) However, it was clear that paragraph 10 had offended O. 18 r. 7(1) of the RHC in that: (i) evidence by which the facts were to be proved had been stated, and (ii) the facts had not been stated concisely in a summary form. Paragraph 10 constituted a statement of evidence of motive rather than a concise fact of it. The paragraph thus could not be allowed to stand as it stood (see paras 25, 27).

(4) There are at least two reasons why the fundamental rule of pleading requires only concise facts be pleaded and not evidence. Firstly, by pleading evidence rather than a concise statement of fact, there is a likelihood of compromising the neutrality of the judge consciously or subconsciously before he hears the evidence. Secondly, a statement by a party purporting to state evidence rather than concise fact may well be erroneously assumed to be true by others, even before its truth is ascertained by a judge after assessing evidence presented (see paras 33-35).

(5) In the instant case, paragraph 10 could have exposed the plaintiff to prejudgment, prejudice and probable untruth. It was therefore vexatious and an abuse of process of the court and calculated to prejudice the fair trial of the plaintiff's action. However, paragraph 10 was at most imperfect and the first defendant should not be deprived of a line of his defence. Paragraph 10 ought not therefore be struck out but rather the first defendant ought to be granted latitude to amend his pleading to conform to the requirement of O. 18 r. 7(1) of the RHC (see paras 36, 38).

[52] Another case to refer to would be the case of *Mrs. Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd. & Ors.* [1977] 1 LNS 75; [1978] 2 MLJ 123, a decision of Abdul Hamid Omar J (later the Lord President of the Supreme Court). It would be sufficient, for the moment, for us to refer to the headnotes at p. 123 which stated as follows:

> There were two applications in this case (a) one by the ninth defendant for an order that the plaintiff's action be struck out and (b) by the second to eighth defendants for an order that the plaintiff's claim for damages for conspiracy to publish a defamatory statement of and concerning the plaintiff be struck out. In both

applications there was a common prayer that the particulars filed in reply to the defence of the second to ninth defendants be struck out.

It was agreed that (1) the claim founded on conspiracy to defame had merged with the claim for libel and (2) that the particulars filed by the plaintiff were in contravention of Order 19 rule 22 in that evidence by which the facts were to be proved was pleaded.

Held: (1) the claim to 'conspire to defame' had merged with the claim for libel and therefore the application that the allegations as to conspiracy to defame in the statement of claim should be struck out should be allowed;

(2) only material facts must be pleaded but not evidence by which they were to be proved. A substantial part of the particulars given by the plaintiff were clearly evidence and ought to be struck out;

(3) the plaintiff be ordered to file fresh particulars which should be in strict compliance with Order 19 rule 22 of the Rules of the Supreme Court.

[53] And at p. 126 of the report, Abdul Hamid Omar J (later the Lord President of the Supreme Court) said:

The other allegations consist of matters such as failure of the Stock Exchange to circulate defaults and irregularities (paragraph 18); 9th defendant's failure to disclose malpractices and suppression of facts (paragraph 19); condonation of malpractices and corrupt practices (paragraph 20); deliberate lies perpetuated by the 9th defendant (paragraphs 21 and 22); fleecing of funds (paragraph 23); discrepancies in charges and quotations by printers and commissions received and so forth (paragraphs 24 to 48 – a total of 25 paragraphs). The so-called particulars in these paragraphs seems to be nothing but evidence.

[54] In so far as amendments are concerned, O. 20 r. 5 of the RHC should be referred to. That order reads as follows:

5 Amendment of writ or pleading with leave (O. 20 r. 5)

(1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

A (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

B

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

C

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ, or the making of the counterclaim, as the case may be, he might have sued.

D

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

E

F **[55]** It goes without saying that by virtue of this rule, the court may give leave to amend on an application or the court may of its own motion allow amendments of any of the pleadings. Rule 5 of O. 20 of the RHC is all encompassing. It applies to an originating summons as well as to an originating notice of motion and to a writ (*Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2004] 7 MLJ 224).

G

[56] It is appropriate, at this juncture, to state the general rules galvanised from the decisions of the judges. These are mere general rules that will serve as guidelines because, at the end of the day, each case has to be examined separately. It is acknowledged that no two cases are the same.

H

[57] Firstly, an amendment will be allowed if the opposing party does not suffer injustice as a result of the proposed change to the plaintiff's case (*Khoo Tau Guan v. Weng Lai Ping & Ors* [2004] 5 CLJ 249).

I

[58] Secondly, the court will exercise its discretion whether to allow the pleading to be amended. Towards this end, the court will consider the position of the parties by assessing the effect of the amendment on the plaintiff as well as the defendant.

[59] Thirdly, the exercise of the discretion to allow late amendment involves balancing two competing situations. On the one hand, it is desirable that every point that a party wants to reasonably put forward be ventilated and that the other party can be compensated with costs for any damage suffered. On the other hand, it would be unfair if the application to amend is allowed because other litigants who are waiting in cue for their cases to be heard will be told that their cases will be adjourned because of the length of time to hear the application to amend.

[60] Fourthly, where the proposed amendments did not change the character of the dispute, and were made *bona fide* and caused no prejudice to the opposite party which could be compensated with costs, the court would allow such amendments (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (supra)*; and *Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd, Genesis The As Agency Sdn Bhd (Third Party) (supra)*).

[61] Fifthly, the amendment will not be allowed if the resulting prejudice cannot be compensated in costs (*Tan Sri Dato Paduka (Dr) Ting Pek Khing v. Hii Chang Pee (No 2)* [2003] 5 CLJ 554).

[62] Sixthly, the amendment will not be allowed if the facts or substantially the same facts did not exist at the commencement of the action (*Sio Koon Lin & Anor. v. S.B. Mehra* [1980] 1 LNS 135, FC; *Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1984] 2 CLJ 232; [1984] 1 CLJ (Rep) 522; *Lim Yong Swan v. Lim Jee Tee & Anor* [1993] 1 SLR 500, CA; and *The 'Virginia Rhea'; China Steel Corp. & Anor. v. M.V. 'Virginia Rhea', Owners of* [1982] 1 LNS 66).

[63] Seventhly, this court in *Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703, CA laid down two requirements to be satisfied before allowing an amendment pursuant to O. 20 r. 5 of the RHC (see p. 710 of the report):

> a plaintiff seeking an order under it must satisfy two requirements: (a) that the facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him. If he fails in one, he fails altogether.

[64] Now, in *Yamaha Motor Co. Ltd. v. Yamaha (M) Sdn. Bhd. & Ors.* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, the Federal Court with a coram of Wan Suleiman, Abdul Hamid Omar and Mohamed Azmi FJJ had occasion to deal with the issue of amendments under O. 20 of the RHC. This was what Mohamed Azmi FJ delivering the judgment of the Federal Court had to say at p. 429 of the report:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[65] My learned brother Mohd Hishamudin JCA while seating on the High Court bench applied the case of *Yamaha Motor* in construing O. 20 r. 5 of the RHC in his Lordship's judgment in the case of *Kaplands Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2000] 4 CLJ 281. This was what his Lordship said at p. 284 of the report:

> Where a party applies to the court for leave to amend his pleading pursuant to O. 20 r. 5 of the Rules of the High Court 1980, he must, except in cases where the amendment is plainly and obviously trivial in nature or where there is no opposition to the application, satisfy the court that the application is in compliance with the principle as laid down by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213.

[66] In our judgment, in exercising the court's judicial discretion as to whether to allow the proposed amendments advanced by the appellants, the salient words of Lord Griffiths in the case of *Ketteman and Others v. Hansel Properties Ltd. And Others* [1987] 1 AC 189, HL, should be heeded. There his Lordship declared that an amendment will not be allowed merely because the opposing party would not be prejudiced by it. His Lordship continued in serious vein at p. 220 of the report:

> Where an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

[67] We now come to the crucial part of the appeal. From the grounds of judgment of the learned JC, it is evident that his Lordship had examined carefully each and every paragraph of the proposed amendments and his Lordship was satisfied that the proposed amendments infringed the rules of pleading and that the appellants were attempting to plead material evidence which is not permissible.

[68] In our judgment, the learned JC has exercised his discretion judicially. We saw nothing wrong with the approach adopted by the learned JC and we unanimously endorsed his decision as correct and within the law. There were no reasons for us to interfere.

[69] An analysis of the proposed amendments at para. 32 to 39 showed the following unhappy state of affairs. These proposed amendments offend the rules of pleadings because they set out the detailed evidence to support the various allegations and the detailed evidence of what had transpired between the appellants and the

A third parties where the respondent was not a party to those transactions (*Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors (supra)*; and *Mrs. Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd. & Ors (supra)*).

B **[70]** The particulars of the proposed amendments benefitted the appellants in that the appellants were able to gain an undue advantage by introducing evidence without the need of the trial court to determine its relevancy and admissibility *(Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors (supra))*.

C **[71]** The particulars of the proposed amendments substantially contain detailed particulars of evidence which would compromise the neutrality of the trial judge whether consciously or sub-consciously before he proceeds to hear the evidence and this would in turn expose the respondent to pre-judgment, prejudice and probable D untruth *(Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors (supra))*.

[72] It follows as the night the day that to allow the proposed amendments would prejudice the fair trial of the respondent's action. E To compound the matter further, the proposed amendments can best be described as vexatious and an abuse of the process of the court *(Dato' Gopal Sri Ram v. Dato' C Vijaya Kumar & Ors (supra))*.

[73] The proposed amendments contravened O. 20 r. 5 of the F RHC in that they are not concise statements of material facts but rather detailed evidence and the prejudice to the respondent cannot be compensated by costs *(Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn Bhd. & Ors (supra))*.

G **[74]** We observed that the respondent challenged the appellants' submissions that the proposed amendments were material facts pleaded to enable the real question in controversy, to wit, issues of fraud and unjust enrichment to be determined. In our judgment, the appellants have infringed the provisions of O. 18 r. 8 of the RHC in that matters which must be specifically pleaded were not pleaded H instead detailed evidence was set out *in extenso*.

[75] The third party proceedings commenced by the appellants are separate proceedings and they bear no relevance to the respondent. We categorically say that the issues between the appellants and the I third party cannot be enhanced by way of amendments to the statement of defence.

[76] At this point of time, it is not the duty of the court to determine the merits of the amendments. Neither would the court embark on a prolonged investigation of the merits because such an exercise should be left to the trial judge (*Kings Quality Homes Ltd v. Aƒ Paints Ltd* [1997] 3 All ER 267, CA). The court is only concerned whether the proposed amendments offend against the rules of pleading and the law on amendments.

[77] We are of the considered view that the documentary evidence assisted the court to evaluate the particulars in the proposed amendments to be nothing short of disputed evidence which must proceed for trial.

[78] In regard to the issue of delay, we have this to say. If you calculate from 6 December 2001 being the date the appellants filed their original statement of defence to the date on 3 November 2006 when the appellants filed an application to amend their statement of defence, the delay would be four years ten months 27 days.

[79] And when the registrar struck out the respondent's writ of summons and the statement of claim on 20 March 2002 until it was re-instated by this court on 14 June 2005, the appellants had time to reflect for three years two months 24 days before deciding to amend its statement of defence.

[80] Between 14 June 2005 when the writ of summons and the statement of claim were re-instated by this court to 3 November 2006 when the appellants filed an application to amend their statement of defence, the delay would be one year four months and 19 days.

[81] Nik Hashim JCA (later FCJ) in *HSBC Bank Malaysia Bhd v. Macquarie Technologies (M) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121, CA, on the issue of delay, had this to say at p. 129:

> On the question of delay, it is worthy of note that delay alone is not a ground to refuse an application for leave to amend. In *Wright Norma v. Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 at p 519, the court held:
>
> > While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay *per se* does not equal prejudice or injustice. We do not think any rigid rule should or can be laid down on this.

A It was further held at p 523 that:

> ... the learned judge ... had erred in exercising his discretion when ... he treated delay as being decisive to the question. It is but one factor to be placed on the scale.

B **[82]** And my learned brother Mohd Hishamudin JCA had this to say about the issue of delay at the High Court in the case of *Kaplands Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd (supra)* particularly at pp. 287-288 thereto:

C I shall now move on to my second ground. It is this. There has been a long delay in applying for the amendment and the delay has not been accounted for by affidavit evidence. Even if the plaintiff's affidavit (which has been rejected by this court) were admissible, the affidavit, as can be seen, does not give any reason for the long delay. The suit was filed on 28 May 1998 and the case was fixed D for trial twice since then. But the application to amend was only filed on 29 May 2000. Thus there has been a delay of about two years. The House of Lords in *Ketteman & Ors v. Hansel Properties Ltd* [1988] 1 All ER 38 has issued a warning to litigants in regard to the frequent practice of making late applications for amendments. Lord Griffiths said (at p 62): E

> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted F efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very G late stage of the proceedings.

The above passage was cited with approval by our Court of Appeal in *Bacom Enterprises Sdn Bhd v. Jong Chuk* [1998] 2 CLJ 11.

H **[83]** In our judgment, the delay here, being one of the factors to be considered, must be construed in favour of the respondent.

Conclusion

[84] For the reasons adumbrated above, we unanimously dismissed I the appeal with costs of RM10,000. The deposit should rightly go to the respondent.